STATE OF ILLINOIS
BEFORE THE ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission On Its Own Motion	:	
	:	**ICC Docket No. 11-0710**
In re Proposed Contracts Between Chicago Clean Energy, LLC and Ameren Illinois Company and Between Chicago Clean Energy, LLC and Northern Illinois Gas Company for the Purchase and Sale of Substitute Natural Gas Under the Provisions of Illinois Public Act 97-0096	:	

VERIFIED APPLICATION FOR REHEARING OF CHICAGO CLEAN ENERGY, LLC

February 9, 2012

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Chicago Clean Energy, LLC ("CCE"), by and through its attorneys, DLA Piper LLP (US), and pursuant to 220 ILCS 5/9-220(h-3)(7) or, alternatively, 220 ILCS 5/10-113, and 83 Ill. Admin Code. § 200.880 and the comments of four of the five Commissioners at the Commission's January 10, 2012 open meeting, respectfully submits this Verified Application for Rehearing of the Order entered by the Illinois Commerce Commission (the "Commission") and served on the parties on January 10, 2012 (the "January 10 Order"). This Application for Rehearing respectfully seeks Commission reconsideration of components of the January 10 Order addressing substantial terms and conditions contained in the sourcing agreement approved by the Commission ("Sourcing Agreement") that - if not modified - would render the project unfinanceable and effectively kill the project. In support of this Application for Rehearing, CCE states as follows:

I.

INTRODUCTION

The statutory provisions associated with the CCE facility are unique, and the compressed timeline for Commission review in this proceeding was unusual, if not unprecedented. That fact was noted repeatedly by the Chairman and Commissioners at the January 10, 2012 open meeting, as was the notion that rehearing would be appropriate in order to allow the Commission a fuller opportunity to evaluate the issues presented in this docket.

The statutory framework established by the General Assembly set forth a critical but very restricted role for the Commission to play in developing the Sourcing Agreement. The Commission was given limited time to implement its defined role within this process and issue its Order approving the Sourcing Agreement. This was further complicated by the fact that the terms of the legislation defining the Commission's role changed during the pendency of this proceeding. (*See* P.A. 97-0630 amending 220 ILCS 5/9-220(h-4); CCE Reply Brief on Exceptions at 4-5; CCE Brief on Exceptions at 7-17.) Under the amended statute, the General Assembly stated that, to the extent there were any prior determinations made by the Illinois Power Agency ("IPA"), the Commission was not to disturb those decisions except as specifically authorized by the new statute. (*See id*.) For whatever reason, the January 10 Order failed to conform to the limitations set forth in the statute and included findings and conclusions that exceeded the Commission's statutory authority.

Rehearing is appropriate to allow the Commission to reconsider the Commission's limited role in the statutory framework associated with the project's development, to allow the Commission to better understand the clear merits of the project that have been repeatedly

endorsed by the General Assembly, and to modify the January 10 Order consistent with the General Assembly's legislative intent.

At the Commission's January 10, 2012 open meeting, the Chairman suggested that it might be appropriate for the General Assembly to provide further guidance regarding the Commission's role. On February 8, 2012, the Illinois House of Representatives adopted Resolution HR 755, confirming the Commission's limited role in developing the Sourcing Agreement. (A true and correct copy of HR 755 is attached hereto as Attachment A.) Pending before the Illinois Senate is Resolution SR 585, which is identical in substance to HR 755; upon information and belief, SR 585 will be taken up by the Senate on February 23, 2012.

The Commission also should be confident that the policy conclusions underlying the Act and contained in the final draft sourcing agreement emailed from the IPA to the Commission on October 11, 2012 (the "final draft sourcing agreement") are reasonable. While CCE believes that an examination of merits of the project and the terms of the final draft sourcing agreement are beyond the scope of the Commission's review, CCE provided information supporting those positions to the Commission in prior filings. (*See, e.g.*, CCE Brief on Exceptions at 6-7 (summarizing the bases for each Exception).) Within the instant Application for Rehearing, CCE provides further explanation and justification for those conclusions. Accordingly, CCE respectfully submits that, assuming *arguendo* that the Commission acted within its authority, the Commission's decisions in the January 10 Order still should be further examined and revised on rehearing because the Commission's decisions were not reasonable, based on the information provided.

To meet the mandate set out by the General Assembly and the Governor, CCE respectfully requests that the Commission grant the instant Application for Rehearing, further

consider this matter, and enter an Order on Rehearing in the form and substance of the Draft Order on Rehearing attached hereto and made a part hereof as Attachment B, approving Sourcing Agreements in the form and substance of the CCE Draft Sourcing Agreement attached hereto and made a part hereof as Attachment C.

II.

THE DEVELOPMENT OF THE CHICAGO CLEAN ENERGY PROJECT IS CONSISTENT WITH FEDERAL, STATE, AND LOCAL POLICY

Numerous and recent public pronouncements and official actions by government officials provide important context for the Commission's review of this project and this Application for Rehearing.

The General Assembly has made it clear that the development of a clean coal SNG brownfield facility in Chicago is a top priority for the State by passing with super-majorities in both chambers two bills, both signed by the Governor. (*See* Pub. Act 97-0096; Pub. Act 97-0630.) The General Assembly began analyzing this project years ago , authorizing and funding a $10 million Facility Cost Report that was overseen by the IPA and its outside experts and that validated the economics of the clean coal SNG brownfield facility. (*See* P.A. 96-0781 and P.A. 96-0784.) The IPA presented its report to the General Assembly, and the General Assembly concluded that it is desirable to develop the clean coal SNG brownfield facility, under the terms of a contract structure that the General Assembly (and the IPA later) determined to be fair. (*See* Pub. Act 97-0096.) The General Assembly took the extraordinary step of passing a "trailer bill" during the pendency of this proceeding that endorsed the IPA's final draft sourcing agreement, with the exception of directing the Commission to remove two early termination provisions and correct typographical and scrivener's errors. (*See* Pub. Act 97-0630.) The General Assembly's

direction to the Commission was reiterated in identical Resolutions adopted by the House and pending in the Senate. (*See* HR 755; SR 585.)

In revisiting the January 10 Order, the Commission should be aware that the clean coal SNG project at issue in this proceeding fits *precisely* with the national, state, and local policy goal of building home-grown, technologically advanced, energy projects using Illinois resources and Illinois labor.

- In his January 24, 2012 State of the Union Address, President Obama described the need for "an all-out, all-of-the-above strategy that develops every available source of American energy. A strategy that's cleaner, cheaper, and full of new jobs." (http://www.whitehouse.gov/the-press-office/2012/01/24/remarks-president-state-union-address, at 4.)

- In his February 1, 2012 State of the State Address, Governor Quinn emphasized the importance of fostering the development of jobs in Illinois in order to combat deficits and unemployment: "We have real challenges to tackle. Like all of you, I recognize the severity of our fiscal situation. But cuts alone will not resolve this situation. We must build and grow our economy." Governor Quinn highlighted the CCE project as a driver of economic development at the bill signing for Public Act 97-0096 on July 13, 2011: "A $3 billion dollar investment that's going to create a lot of jobs…we want to develop right here, domestically, in Illinois, our sources of natural gas that are reliable affordable, and clean." (Press Release, Governor Pat Quinn, Governor Quinn signs Legislation to Advance Clean Energy Project, Create 1500 Jobs (July 13, 2011) (*See* http://illinois.gov/PressReleases/PressReleasesListShow.cfm?RecNum=9540.))

- Chicago Mayor Rahm Emanuel similarly laid out a vision for Chicago as a nucleus of clean energy investment: "We're a city that's on the move. People want to invest in our city, and I want to make clean technology the cornerstone of that investment. … This is about economic growth. This is about bringing opportunities to the city, about jobs. We have all the pieces that make Chicago the perfect place to be the center of gravity as it

relates to new technology in the field of alternative energy." (*See* http://news.medill.northwestern.edu/chicago/news.aspx?id=181811.)

The General Assembly and the Governor have, through word and legislative action, repeatedly endorsed the development and construction of the clean coal SNG brownfield facility in Chicago. (*See* CCE Brief on Exceptions at 2-3.) The project is highly important for Illinois, and is entirely consistent with national, state, and local economic, energy, and environmental policy initiatives that seek to promote near-term investment and job creation in underdeveloped places like the south side of Chicago through construction and operation of a cutting-edge, environmentally advanced energy project, using Illinois resources at a plant located on an unused former industrial brownfield site. In addition, the legislative framework provided by the General Assembly includes consumer protection mechanisms that limit the risk of consumer loss, and provide substantial "up-side" benefits to consumers through shared revenues from ancillary sales and guaranteed savings. (*See* 220 ILCS 5/9-220(h-1)(7), (h-2).)

The chief bill sponsors made it clear that it was the intent of the General Assembly to have the project developed consistent with the economics established by the Capital Development Board, the rate of return previously-established by the Commission, and the exact terms and conditions of the IPA-approved final draft sourcing agreement, modified **only** as directed by P.A. 97-0630. (*See* Economic Development Intervenors Brief on Exceptions, Attachment A; Transcript of Public Comment at the Commission's January 10, 2012 Bench Session.)[1] The House already has reiterated this point, and the Senate likewise is poised to provide this unambiguous direction to the Commission. (*See* HR 755; SR 585.)

[1] At the time filing this Application for Rehearing, the transcript for the January 10, 2012 Bench Session has not been released, so CCE is unable to quote from or cite to the Bill Sponsors' statements.

III.

STATUTORY AUTHORITY AND PROCEDURE FOR REHEARING

CCE seeks rehearing under Section 9-220(h-3) of the Act, which provides a specific procedure for rehearing of the Commission's January 10 Order:

> Unless otherwise provided, within 30 days after a decision of the Commission on recoverable costs under this Section, any interested party to the Commission's decision may apply for a rehearing with respect to the decision. The Commission shall receive and consider the application for rehearing and shall grant or deny the application in whole or in part within 20 days after the date of the receipt of the application by the Commission. If no rehearing is applied for within the required 30 days or an application for rehearing is denied, then the Commission decision shall be final. If an application for rehearing is granted, then the Commission shall hold a rehearing within 30 days after granting the application. The decision of the Commission upon rehearing shall be final.

(220 ILCS 5/9-220(h-3)(7).) To the extent that the Commission concludes that the Commission's January 10 Order, or any portion thereof, is not subject to rehearing under Section 9-220(h-3), CCE alternatively seeks rehearing under the general rehearing provision of the Act, 220 ILCS 5/10-113.

With regard to procedure, CCE believes that, with the instant filing as well as the prior filings made by CCE, the Commission has received sufficient legal briefing and information to establish the reasonableness of the Draft Order and Sourcing Agreement provisions CCE has suggested. However, if the Commission believes otherwise, CCE would respectfully request an expedited schedule for the simultaneous filing of Verified Comments and subsequent Briefs on Rehearing with attached Draft Proposed Orders. Although somewhat complex, the matters at issue on rehearing are well known to the parties and can be briefed on an expedited basis without undue burden. The legislative debate on the floor of the House regarding HR 755 confirmed that the General Assembly intended that any rehearing should occur in an expedited manner. (*See* http://www.youtube.com/watch?v=qkRpehpL3KA&feature=email, Rep. Bost.)

IV.

REHEARING IS REQUIRED TO CONFORM THE JANUARY 10 ORDER TO THE APPLICABLE STATUTE AND TO PERMIT THE PROJECT TO ADVANCE

Given the amount of private financing necessary to advance the CCE project - a $3 billion investment of new private funds in Illinois - it is critical that the project be able to obtain financing; specifically, debt financing secured by assured revenues from the Sourcing Agreement. Without a Sourcing Agreement which enables that private financing as envisioned by the General Assembly, the project simply will not become a reality. To that end, in its Brief on Exceptions dated December 27, 2011 and Reply Brief on Exceptions dated January 5, 2012, CCE identified several problems with the Proposed Order, each of which threatened the financeability of the project. (*See* CCE Brief on Exceptions at 6-7; CCE Reply Brief on Exceptions at 8-16.) One of those issues -- the Maximum DCQ issue -- was addressed and corrected in the January 10 Order, fixing a scrivener's error that would have prevented the clean coal SNG brownfield facility from selling more than 50% of the facility's output. (*See, e.g.*, January 10 Order at 23.) However, the other issues identified by CCE were not modified in the January 10 Order, thus each remains a fatal barrier to financeability of the project.

The following items remain fatal threats to financeability:

- **Billing Determinants** -- The January 10 Order improperly revised the "billing determinant" terms in the IPA-approved final draft sourcing agreement. The "billing determinant" concept describes the denominator in a per-MMBtu cost calculation, which effectively sets the percentage of costs that CCE is able to recover under the Sourcing Agreement from sales to Ameren Illinois Company ("Ameren") and Northern Illinois Gas Company ("Nicor"). The IPA was clear when it stated in no uncertain terms: "For purposes of determining the Capital Component, the Annual Contract Quantity will be 43.5 Bcf" and "For purposes of determining the O&M Component, the Annual Contract Quantity will be 43.5 Bcf." (*See* IPA final draft sourcing agreement at 21.) Based on an impossible and purely hypothetical situation raised by Nicor, the Order incorrectly revised this provision in the IPA-approved final draft sourcing agreement. This revision would result in a 16% shortfall in CCE's capital and O&M recovery, while still requiring CCE to provide 100% of the benefits

of the revenue-sharing provisions to Ameren and Nicor's customers. (*See* January 10 Order at 21.) The correct approach would be for the Commission to approve the billing determinant terms of the final draft sourcing agreement submitted to the Commission by the IPA. (*See* CCE Brief on Exceptions at 36-38; CCE Reply Brief on Exceptions at 9-12.) The billing determinant should be set at 43.5 bcf.

- **Annual Output** - The January 10 Order incorrectly stated that CCE and the IPA overstated the anticipated output of the SNG facility, and improperly revised the schedule in the IPA-approved final draft sourcing agreement which is used to calculate the capital and O&M charges. In Schedules 5.2A and 5.2B, the lower value of 44,787,326 MMBtu was used in calculations instead of the IPA-approved Annual Output of 47,799,714 MMBtu. (*See* January 10 Order at Appendix; *see also* Corrected Appendix dated January 11, 2012.) The correct approach would be for the Commission to approve the terms of the final draft sourcing agreement submitted to the Commission by the IPA, and use the Annual Output of 47,799,714 MMBtu for all appropriate calculations. (*See* CCE Brief on Exceptions at 28-30; CCE Reply Brief on Exceptions at 9-12.)

- **Monthly Base Overage Amount** - The January 10 Order incorrectly revised the "Monthly Base Overage Amount" provision in the IPA-approved final draft sourcing agreement, and instead endorsed a figure proposed by Staff that had no support in the evidentiary record. (*See* January 10 Order at 32 *but see* CCE Brief on Exceptions at 44-45.) This term sets the benchmark against which early draw downs from the Consumer Protection Reserve Account are calculated, if needed. The correct approach would be for the Commission to approve the "Monthly Base Overage Amount" term contained in the final draft sourcing agreement submitted to the Commission by the IPA.

- **Third Party Guarantor** -- The January 10 Order incorrectly adds a requirement that CCE obtain third-party guarantor. This provision, which was devised by the Commission Staff, would require CCE to have a third-party - such as CCE's parent company - guarantee the performance of the Guaranteed Consumer Savings. As Staff itself recognized, this requirement was not within the Commission's purview in this proceeding and should not have been endorsed in the January 10 Order. (*See* CCE Brief on Exceptions at 41-42.) Furthermore, CCE has provided expert analysis from The Brattle Group, attached hereto and made a part hereof as Attachment E, that shows alternatives for how CCE could adapt to future market conditions and significantly increase the residual value of the facility, to address almost all hypothetical outlier future scenarios.

- **Capital Structure Reporting** - The January 10 Order includes a requirement that CCE make a compliance filing with the Commission after it "issues the debt" about its actual capital structure that will impact cost recovery. Under the terms of the Act, CCE's recovery from ratepayers is to vary based upon its cost of capital; it is not to vary with its capital structure. Further, it will not be possible to determine CCE's final capital structure until after CCE has finished its capital spend (since equity holders are required to absorb cost overruns). This additional requirement is

unauthorized, inappropriate, and should be deleted. (*See* CCE Brief on Exceptions at 46-48.)

- **Carbon Sequestration** - The January 10 Order endorsed a request of the Attorney General's Office requiring that the final draft sourcing agreement include a reference to the clean coal SNG brownfield facility's duties under Section (h-5) of the Act (220 ILCS 5/9-220(h-5)). (*See* AG Statement of Position at 1-3.) The AG's request is premature, because although the Commission lacks authority to add terms to the IPA's final draft sourcing agreement, the Commission has a duty to approve the clean coal SNG brownfield facility's Carbon Capture and Sequestration Plan, which will be attached as an appendix to the Sourcing Agreement. (*See* Final Draft Sourcing Agreement at Schedule 5.2D (currently labeled "To be attached after ICC approval of the Carbon Capture and Sequestration Plan").) In its Brief on Exceptions, the AG suggested that an acceptable alternative is for the Final Order to specify that a Carbon Capture and Sequestration Plan proceeding will indeed occur. This step, which is within the Commission's authority, would be an appropriate remedy to satisfy the AG's need for confidence that the monitoring and reporting issues critically necessary for proper enforcement can be properly addressed. (*See* 220 ILCS 5/9-220(h-7)(2).)

- **Termination Provisions** - Section 9-220(h-4) of the Act (as amended by Public Act 97-0630), required that the Commission strike any provision allowing early termination for reasons other than those specifically enumerated. Despite the straight-forward language in the applicable statute directing the Commission to remove termination provisions, the January 10 Order failed to clearly remove either one of the two termination provisions from the final draft sourcing agreement. (*See* CCE Brief on Exceptions at 42-44; January 10 Order at 32.)

- **Typographical and Scrivener's Errors** - The January 10 Order failed to correct numerous typographical and scrivener's errors that CCE identified, and that Staff agreed should be corrected.

The comprehensive statutory framework established by the General Assembly sets forth the Commission's critical but narrowly-defined role. (*See* CCE Brief on Exceptions at 7-17; CCE Reply Brief on Exceptions at 4-7.) With all due respect, the January 10 Order failed to conform to those limitations and included findings and conclusions that plainly exceeded the Commission's statutory authority. Rehearing should be ordered to re-examine and modify the portions of the January 10 Order that exceed the Commission's statutory authority.

In addition to discussing the Commission's legal authority, CCE also discussed the merits of each of the issues above, explaining that CCE's position is justified, based on the evidence

available to the Commission. (*See, e.g.*, CCE Brief on Exceptions at 6-7 (laying out bases for each Exception), 28-30 (Annual Output), 36-38 (billing determinants), 41-42 (guarantor), 43 (termination provision), 44-45 (Monthly Base Overage Amount), 46-48 (capital structure); CCE Reply Brief on Exceptions at 9-10, 12 (billing determinants), 10-12 (Annual Output), 12-13 (termination provision.) Accordingly, CCE respectfully submits that - assuming *arguendo* that the Commission acted within its authority to address the issues above - the Commission's decisions should still be further examined on rehearing because there is a substantial question of whether the Commission's decision was reasonable based on the information provided.

A. The Commission Should Grant Rehearing To Reverse Modifications That Were Made To The IPA-Approved Final Draft Sourcing Agreement

The Commission should grant rehearing to reverse a number of modifications that the January 10 Order made to the IPA-approved final draft sourcing agreement. In each instance, rather than approving the terms included in the final draft sourcing agreement submitted by the IPA as required by the Act, the Commission approved different terms. In each instance, the Commission's decision exceeds its statutory authority and is contrary to the information provided to the Commission.

(1) Billing Determinants:

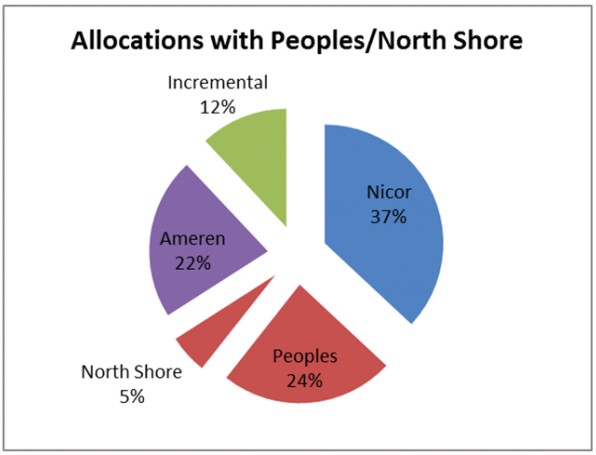
Billing Determinants refers to the denominator in the calculation used to derive the per-MMBtu charges for capital and O&M recovery. This in turn determines the maximum percentage of the facility's costs to be recovered from the utilities under the terms of the sourcing agreement. It is a maximum percentage because the profits from any sales above the Annual Output allocated to Ameren and Nicor customers will be split evenly between the customers' Consumer Protection Reserve Account and CCE. The IPA's final draft sourcing agreement endorsed a compromise position that CCE had offered in the mediation, providing for a billing determinant of 43.5 bcf, and an effective 95% cost recovery. The January 10 Order would revise the terms of the IPA's final draft sourcing agreement and provide for just 84% cost recovery, allocating Ameren and Nicor customers 42% of capital and O&M costs each, ostensibly because Ameren and Nicor ratepayers receive 42% of the SNG each. (*See* January 10 Order at 21.) The Commission's decision exceeds the Commission's authority and is contrary to the information provided to the Commission.

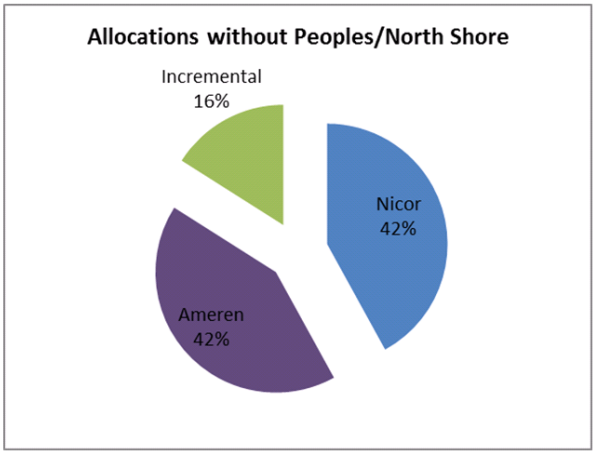
Although the January 10 Order purports to follow cost causation principles, it fails to take into consideration the benefit-sharing components of the structure created by the General Assembly. As the Commission is aware, in addition to producing SNG at the facility, a number of additional products will be produced and those ancillary products will be sold into the competitive market. (*See* 220 ILCS 5/9-220(h-1)(7).) Only the customers of Nicor and Ameren would share in the revenue that the project makes from those sales of ancillary products.

In addition to receiving 100% of the benefit of the ancillary revenue split, the customers of Nicor and Ameren receive 100% of the $100 million in Consumer Savings Guarantee. (*See* 220 ILCS 5/9-220(h-2) ("The clean coal SNG Brownfield Facility shall guarantee a minimum of

$100,000,000 in customer savings to customers of the utilities that have entered into sourcing agreements".) Furthermore, the customers of Nicor and Ameren are protected from rate increases under the terms of the "rate cap" that the General Assembly established in the Act. (*See* 220 ILCS 5/9-220(h-2)(1).) This is the trade-off that the General Assembly endorsed in having the customers of the purchasing utilities pay 100% of the capital costs associated with the facility (actually, just 95% of those costs under the terms of the IPA-approved final draft sourcing agreement).

Further, the Commission should be aware that, even if Peoples Gas and North Shore Gas had opted to enter into Sourcing Agreements rather than biennial rate cases, capital cost-recovery would still not have been aligned with the utilities' purchase obligations. That is, the General Assembly did not intend for capital cost recovery to be tied to the utilities' purchase obligation. The following charts illustrate the utilities' purchase obligations with and without Peoples and North Shore:





Certainly if Peoples and North Shore were purchasing the output of the facility along with Nicor and Ameren, there would have been no question that CCE is entitled to full cost recovery -- even though the utilities only would have purchased 88% of the output of the facility. In other words, it always was anticipated that CCE would produce additional SNG beyond the

43.5 Bcf utility purchase obligation cap in the Act, and that CCE would split the revenues from those sales with consumers. Under the terms of the January 10 Order, which inexplicably links the utilities' purchase obligation and CCE's capital cost recovery, CCE would experience a 16% shortfall on its capital recovery (*i.e.* it would recover just 84% of its capital costs from Ameren and Nicor ratepayers). As a result, CCE would not be able to make its debt payments, even though those ratepayers would benefit if CCE can sell more SNG, because the ratepayers would receive the benefit from the shared ancillary revenue from other products, would receive the benefit of the Guaranteed Consumer Savings, and are protected in case CCE cannot sell all of the clean coal SNG brownfield facility's output.

The IPA-approved final draft sourcing agreement clearly set the billing determinants for the capital and O&M charges:

- "For purposes of determining the Capital Component, the Annual Contract Quantity will be 43.5 Bcf." (*See* IPA Final Draft Sourcing Agreement at 21)
- "For purposes of determining the O&M Component, the Annual Contract Quantity will be 43.5 Bcf." (*See id.*)

These two terms in the agreement unambiguously require that when the Capital Component and the O&M Component are calculated, the dollar amounts should be divided by 43.5 bcf (equivalent to 42,064,500 MMBtu) in order to determine the per-unit charges. The Schedules 5.2A and 5.2B from the IPA-approved final draft sourcing agreement then show mechanically how this calculation is to occur. To the extent that the January 10 Order revised Schedule 5.2A to illustratively show a sub-calculation of using the approved return on equity (4.44%) to derive the approved dollar amount of equity return, no improper changes were made to the contract terms and conditions. But, the changes in Schedules 5.2A and 5.2B in the January

10 Order that replaced 43.5 bcf / 42,064,500 MMBtu as the denominator for the per-MMBtu cost calculation with 44,787,326 MMBtu were an improper modification to the IPA-approved terms and conditions. This change should be reversed.

Thus, CCE respectfully requests that the Commission's decision to revise the Billing Determinants term in the IPA-approved final draft sourcing agreement be reversed because:

- The Commission did not have authority to revise this term; and
- Even if the Commission did have the authority to revise this term, the information provided to the Commission justifies the term contained in the IPA-approved final draft sourcing agreement.

(2) Annual Output For The Facility:

The "Annual Output" is the amount of output of SNG expected from the clean coal SNG brownfield facility - setting this number too low will increase the cost of each unit of SNG (because CCE's approved costs, recovered through a per-unit charge, will be spread over fewer units of SNG), while setting this number too high will lead to a technical impossibility. The January 10 Order incorrectly states that CCE and the IPA overstated the anticipated output of the SNG facility, and directs that Schedules 5.2A and 5.2B, which are used to calculate the capital and O&M charges, be revised in the IPA-approved final draft sourcing agreement. The January 10 Order directs that the lower value of 44,787,326 MMBtu should be used in those calculations instead of the IPA-approved Annual Output of 47,799,714 MMBtu. (*See* January 10 Order at 21.)

It appears that the conclusion in the January 10 Order was based upon (1) a misperception of the authority and jurisdiction of the Commission to modify terms of the IPA's

final draft sourcing agreement, and (2) a flawed and incomplete analysis of the data that supported this provision in the IPA's final draft sourcing agreement.

In its prior filings, CCE discussed at length the direction that the General Assembly provided to the Commission to approve the precise terms and conditions that were contained in the IPA's final draft sourcing agreement both generally and specifically with regard to the "Annual Output" term. (*See* CCE Brief on Exceptions at 7-17, 27-28; CCE Reply Brief on Exceptions at 4-7, 10-12.) Those arguments, incorporated by reference, are now further bolstered by the Resolution passed by the House. The General Assembly repeatedly has reviewed the terms of the IPA's final draft sourcing agreement and unambiguously directed the Commission to approve those terms, with the exception of removing the two "early termination" provisions.

Moreover, the Commission should be confident that IPA properly set the Annual Output at 47,799,714 MMBtu in the final draft sourcing agreement. The $10 million facility cost report that analyzed the details of the CCE project, and that was vetted fully by the IPA and its outside experts, the results of which were reported to the General Assembly, concluded that the projected annual output of the facility is 47,799,714 MMBtu. (*See* IPA Memo at 17; *see also* Public Act 96-0781.)

Further, the methodology used by the IPA for the CCE project is consistent with the methodology used by the IPA to set the projected output for the Power Holdings clean coal SNG facility - which uses the same technology. (*See* CCE Brief on Exceptions at 27, 28-29 (citing to Exhibit C to CCE's Brief on Exceptions).) Significantly, neither Nicor nor Ameren challenged the IPA decision with regard to Power Holdings.

CCE has a detailed working design for the facility that is projected to produce 47,799,714 MMBtu/year of SNG. This estimate is derived by starting with the vendor-guaranteed production of the facility, as described by Black & Veatch in the Facility Cost Report, and overlaying that with real-world experience of gasification operators at current facilities using the same technology, and accounting for all other bottlenecks and constraints. This estimate has been vetted by the IPA and its independent engineers over the course of a two-month review. Furthermore, in the timeframe between the publication of the original CCE Facility Cost Report and the current date, GE (the gasification technology vendor for CCE's working design) has introduced an upgraded model which is capable of guaranteeing an even higher output, which is likely to be incorporated into the final design. (*See* CCE Brief on Exceptions, Hudson Affidavit at ¶¶ 37-43; *id*. at Attachment 2.)

There is no legitimate basis to challenge the conclusion of the analysis underlying the Facility Cost Report and the IPA-approved final draft sourcing agreement. The January 10 Order merely asserts in a single sentence that Staff's lower figure is "the best explained estimate and … the most reasonable." (January 10 Order at 21.) However, instead of relying upon a complete analysis of the Facility Cost Report or record evidence, Staff relied solely upon a single document that is not in the record. (*See, e.g.*, Staff Statement of Position at 19-21.) The reference to the lower figure in that document is to the *guaranteed* output of the facility at the time of the lowest seasonally-adjusted production, not the *projected* output. As would be expected, the projected output for the facility is substantially higher than the vendor-guaranteed capacity. (*See* CCE Brief on Exceptions, Hudson Affidavit at ¶¶ 33-37.) Attached hereto as Attachment D is an article discussing a similar facility, using the same gasification technology as

CCE's working design, which was able to consistently run at an output of 132% of its original design rate.

It seems unreasonable for the January 10 Order to conclude that Staff's unverified summary statement, referencing the guaranteed output of the facility as contained in a single document that is not in the record, should be given more weight than the IPA final draft sourcing agreement conclusion regarding the projected annual output that was based upon the $10 million facility cost report, years of working with the underlying source documents, actual plant operators, and scrutiny by independent engineers.

Thus, CCE respectfully requests that the Commission's decision to revise the Annual Output term in Schedules 5.2A and 5.2B of the IPA-approved final draft sourcing agreement be reversed because:

- The Commission did not have authority to revise this term; and
- Even if the Commission did have the authority to revise this term, the information provided to the Commission justifies the term contained in the IPA-approved final draft sourcing agreement.

(3) Monthly Base Overage Amount:

The January 10 Order also improperly revised the "Monthly Base Overage Amount" contained in the final draft sourcing agreement transmitted to the Commission by the IPA. As with the "Billing Determinant" and "Annual Output" provisions, the Commission has no statutory authority to revise that term. To the contrary, the General Assembly has continued to stress that the Commission was not to revise the terms of the IPA-approved final draft sourcing agreement unless it was specifically directed to do so. (*See* HR 755.)

Further, there was no evidentiary basis for the Commission to revise the IPA's "Monthly Base Overage Amount" definition. The January 10 Order merely concludes that Staff identified a problem with this definition, and that the IPA "appears to agree." (January 10 Order at 32.) However, Staff did not provide any evidentiary basis for its alternate calculation, and the IPA's request that the Commission revise its decision was improper as a matter of law. (*See* Staff Statement of Position dated Dec. 16, 2011 at 8-9 (not providing any calculations); CCE Brief on Exceptions at 17-24 (citing authority including *Caldwell v. Nolan*, 167 Ill. App. 3d 1057, 522 N.E.2d 175 (1st Dist. 1988).)

The impact of this revision would be to set the "Monthly Base Overage Amount" too low, potentially requiring CCE to tap into the Consumer Protection Reserve Account prematurely. As the Commission is aware, under the Act's terms, CCE is providing customers with $100 million dollars in guaranteed savings, backed in part by a $150 million initial contribution by the developer into this account; this account will be drained if the price for the facility's SNG exceeds a rate capped by the Monthly Base Overage Amount. Thus, setting the Monthly Base Overage Amount too low could deplete this account prematurely. When Staff recommended a roughly $60 million dollar drop to the annualized value, that reflects money that is potentially being removed from the pockets of ratepayers toward the end of the Sourcing Agreement's term.

Thus, CCE respectfully requests that the Commission's decision to revise the definition of "Monthly Base Overage Amount" in IPA-approved final draft sourcing agreement be reversed because:

- The Commission did not have authority to revise this term; and

- Even if the Commission did have the authority to revise this term, the information provided to the Commission did not justify revising this definition contained in the IPA-approved final draft sourcing agreement.

(4) Conclusion:

CCE respectfully requests that the Commission grant rehearing to re-evaluate the Commission's limited authority to change the terms and conditions contained in the final draft sourcing agreement that the IPA transmitted to the Commission. In the alternative, even if the Commission believes that it has statutory authority to make the changes it made, the Commission should take this opportunity to examine the complex interplay between these and other contract provisions in determining the appropriate Billing Determinants, Annual Output, and the Monthly Base Overage Amount.

B. The Commission Should Grant Rehearing To Remove The Additional Obligations That The Commission Added To The IPA-Approved Final Draft Sourcing Agreement

Just as the Commission did not possess authority to change the terms of the IPA-approved final draft sourcing agreement, the Commission lacked the statutory authority to impose additional obligations upon CCE. Specifically, without citing any statutory authority for its decisions, the Commission included requirements that CCE (1) obtain a third-party guarantee to further support the Consumer Savings Guarantee; (2) make an additional filing regarding the capital structure of the facility; and (3) reference its carbon capture and sequestration requirements. (*See* January 10 Order at 20, 32, 33.) While CCE appreciates the consumer perspective that apparently underlies the Commission's desire to impose further obligations upon the facility, the General Assembly has already set forth a comprehensive set of obligations upon the facility, and the Commission was not empowered to supplement or modify those obligations. Further, based upon the information provided to the Commission both previously and in the

instant filing, these additional obligations are not necessary and would undermine the financeability of the facility.

CCE respectfully requests that the Commission grant rehearing to remove these additional obligations (1) because the Commission did not have the authority to impose them; and/or (2) because the additional obligations are factually unjustified.

(1) Third Party Guarantee Requirement:

The January 10 Order adopted Staff's recommendation that CCE be required to obtain a corporate guarantee as a further assurance for the Guaranteed Consumer Savings. Apparently, the Commission was concerned that the policies established by the General Assembly did not adequately protect consumers. However, in making that decision, the Commission was attempting to modify or override a policy decision already made by the General Assembly. The Commission was not empowered to re-evaluate the General Assembly's decision or impose additional conditions upon CCE. Even if the Commission had such authority, the Commission should be confident that sufficient protections already exist under the terms of the Act and the IPA-approved final draft sourcing agreement.

The Commission's action in including this further obligation exceeds the Commission's statutory authority under the Act, a point that Staff itself recognized when it made its suggestion for a corporate guarantor. (*See* Staff Dec. 16, 2011 Statement of Position at 3 ("It is not clear to the Staff that the matter discussed *infra* [i.e., Staff's savings guarantee suggestion] is clearly within the Commission's authority to impose under Section 9-220(h-4) as amended.") (*See also* CCE Brief on Exceptions at 40-41.) The Resolution adopted on February 8, 2012 by the House and pending in the Senate confirm Staff's perception that the General Assembly did <u>not</u> intend to

provide the Commission with the authority to impose additional obligations upon CCE. (*See* HR 755, SR 585.)

The Act sets forth a comprehensive list of requirements and obligations to be imposed upon CCE. Although the Act requires that the SNG brownfield facility guarantee $100 million in savings to consumers, the Act does not require that CCE find a third-party guarantor for that guarantee, instead imposing the obligation upon CCE itself. (*See* 220 ILCS 5/9-220(h-2)(6).) The Commission also should be aware that as part of the legislative process, the General Assembly was focused upon including provisions to support the savings guarantee. The Act requires that CCE create a Consumer Protection Reserve Account in part to back this guarantee, and that the developer deposit $150 million of developer-at-risk funds in that account, as well as 50% of all ancillary revenues over the 30-year term of the Sourcing Agreement (valued at $1.5 billion). (*See* 220 ILCS 5/9-220(h-2), (h-2)(1).) Indeed, following the Governor's veto of SB 3388 (96th General Assembly), the legislation was revised to increase the developer's initial deposit into that account from $100 million to $150 million. (*Compare* 200 ILCS 5/9-220(h-2) *with* SB 3388 (96th General Assembly) (Enrolled), 9-220(h-2).) Thus, the General Assembly was keenly aware of the mechanics of the obligation that it imposed, and exercised its legislative judgment in establishing the statutory framework that is in place.

The IPA-approved final draft sourcing agreement further augments the guaranteed savings, requiring that CCE pledge the facility itself as collateral for this guarantee. As was explained in CCE's Brief on Exceptions, the Indiana Utility Regulatory Commission evaluated the anticipated residual value of a substantially similar facility, and found it to be at least $4.5 billion. (*See* CCE Brief on Exceptions at 41.) Attached hereto and made a part hereof as Attachment E is a further analysis of the likely residual value of the CCE facility performed by

experts at the Brattle Group, which analysis concludes that the value actually is likely to be much higher.

The Brattle Group analysis demonstrates how the CCE facility could be adapted favorably to alternate future energy price scenarios in order to fulfill the obligation for consumer savings. CCE has looked at the economics of 48 different scenarios published by the Federal Energy Information Administration ("EIA") and numerous permutations within each of those (totaling 468 cases studied). The findings of the Brattle Group in earlier analysis regarding rate of return, showed that for a small fraction of these 468 market projections studied, certain combinations of sustained low natural gas prices and high fuel prices so impaired CCE's economics that the facility would be unable to meet the consumer savings guarantee. The premise of many of the hypothetical outlier EIA scenarios make fanciful assumptions about future market conditions inconsistent with reason or history. Further, in each instance, for the vast majority of their natural gas purchases, consumers will be saving billions of dollars per year off of any reasonable projection of future prices, dwarfing any "shortfall" in savings under the Sourcing Agreement. But in the interest of completeness, all scenarios were studied, and it was the existence of the "problematic" outlier scenarios which formed the basis for the Staff suggestion of a further corporate guarantor. However, the Brattle Group's earlier analysis of consumer savings was fundamentally incomplete (and rightfully so, since the purpose of the report was to analyze rate of return, not the savings guarantee), and did not account for CCE's ability to adapt to energy trends, which would evolve over the 30-year contract term.

In Attachment E, The Brattle Group remedies the previous incomplete treatment of these "problematic" scenarios. The first response by CCE is to change the fuel blend from a 50/50 blend of coal and petroleum coke ("petcoke") to 65% petroleum coke and 35% coal. Since

petcoke is forecast to be priced significantly lower than Illinois Basin coal, this has the effect of reducing the SNG price. This blend of fuels is permitted under the Act, if needed to realize consumer savings. (*See* 20 ILCS 3855/1-10.)

The next response by CCE to these hypothetical scenarios follows from the observation that the low natural gas price scenarios uniformly show a widening spread of price divergence from petroleum products (that is, crude oil prices escalate while gas prices remain flat). The obvious response then for CCE would be to convert the facility at the end of the contract term to produce energy products that are indexed to crude oil rather than natural gas. Due to the flexibility of gasification technology, the shifting of the output from SNG to gasoline could be accomplished with relatively modest additional capital. The Brattle Group then analyzes the economics of the facility in the remaining outlier scenarios and concludes that the conversion to gasoline output would serve to add at approximately $700 million to the value of the facility. This means that in a hypothetical scenario where the parties forced the sale of the CCE facility after the contract term in order to make consumers whole, the CCE facility would have significantly increased its ability to cover a shortfall. With further analysis, The Brattle Group then concludes that with a logical market adaptation by CCE, there were only 9 remaining of the 468 (2%) of cases studied where the $100 million consumer savings guarantee would not be met. The original justification for imposing a requirement for a corporate guarantor has been so diminished that it need no longer be viewed as a driver for a substantial change to agreed terms.

Even assuming that the Commission acted within its authority (which CCE does not concede), CCE presented substantial evidence that the guarantor is not necessary, especially given that imposing such a requirement would prevent the project from being financed. (*See, e.g.*, CCE Brief on Exceptions at 41-42.) Accordingly, CCE respectfully requests rehearing

regarding the January 10 Order's direction that the Commission order the clean coal SNG brownfield facility identify a guarantor was reasonable.

(2) Capital Structure Reporting Requirement:

The January 10 Order contains a requirement that CCE make an additional filing regarding the capital structure of the facility. (*See* January 10 Order at 20.) This additional requirement was not contemplated under the Act and is inappropriate. CCE's final capital structure does not impact actual costs to the clean coal SNG brownfield facility's customers. (*See, e.g.*, 220 ILCS 5/9-220(h-3)(1)(B) (requiring capital charge to customers to be on a per MMBtu basis); CCE Brief on Exceptions at 46 (citing to the Act).) Additionally, it is not possible to determine the debt-equity ratio until CCE has finished its capital outlay - this is because the debt is a fixed amount, and the difference between the debt and final capital costs that must be made up for by equity will not be known until final capital costs are known. In other words, as more or less equity must be issued based on the project coming in over- or under-budget, the capital structure will have some variation.

Furthermore, as explained in CCE's Brief on Exceptions, CCE has strong incentives - both in terms of securing financing and maintaining profitability - to arrive at a debt-equity ratio that is as close to 70-30 as possible, while completing the project at or under budget. (*See* CCE Brief on Exceptions at 46-47 (noting issues for CCE if the ratio is higher or lower than 70-30).) Erring one way or the other would either harm CCE's equity margin or threaten to escalate the cost of capital, both of which would damage CCE. (*See id.*) Thus, it is not reasonable to impose new requirements that CCE report its "final" capital structure several years down the road (when such information will become available.

(3) Carbon Sequestration Requirement:

At the request of the Attorney General, the January 10 Order added a provision to the IPA's final draft sourcing agreement referencing the facility's duties under Section (h-5) of the Act. (*See* January 10 Order at 33; AG Statement of Position at 1-3; 220 ILCS 5/9-220(h-5).) Including this additional language exceeded the Commission's authority under the Act. (*See* 220 ILCS 5/9-220(h-4).). Additionally, in substance, the AG's request is premature, because the Commission has a duty to approve the facility's Carbon Capture and Sequestration Plan, which will be attached as an appendix to the Sourcing Agreement. (*See* 220 ILCS 5/9-220(h-5); Final Draft Sourcing Agreement at Schedule 5.2D (currently labeled "To be attached after ICC approval of the Carbon Capture and Sequestration Plan").) In its Brief on Exceptions, the AG suggested that an acceptable alternative is for the Final Order to specify that a Carbon Capture and Sequestration Plan proceeding will indeed occur. This would be an acceptable step that would both satisfy the AG's concerns regarding monitoring and reporting issues without overstepping the Commission's limited authority under the Act.

(4) Conclusion:

The January 10 Order's third party guarantee requirement, capital structure reporting requirement, and carbon sequestration requirement are not contemplated by the Act and, therefore, each was imposed without statutory authority. Furthermore, each requirement is substantively unjustified given the information in the record. The third party guarantee requirement and capital structure requirement should be removed. To the extent necessary, the AG's concern regarding the carbon sequestration requirement can be addressed through a modification that recognizes that a proceeding regarding sequestration will occur. Accordingly, CCE requests rehearing on these issues.

C. The Commission Should Grant Rehearing To Remove The Early Termination Provisions

Under the revisions to Section 9-220(h-4) of the Act pursuant to Public Act 97-0630, the Commission was directed to remove all early termination provisions except those specifically enumerated by the Act. (*See* 220 ILCS 5/9-220(h-4); CCE Brief on Exceptions at 42-44.) As a result, the Commission has a statutory obligation to remove both Section 1.2(h) and Section 14.20 of the final draft sourcing agreement.

Section 1.2(h) explicitly would allow the utilities to terminate the sourcing agreement if the utilities were not allowed to fully recover their costs associated with the sourcing agreement. While it appears that the January 10 Order meant to direct the removal of Section 1.2(h), it is less than clear in this regard.

Section 14.20 is a non-severability provision that effectively would grant parties an avenue to terminate the agreement if one or more of the contractual provisions were invalidated, including Section 2.11 which provides that utilities are allowed to fully recover their costs associated with the Sourcing Agreement. (*See* CCE Brief on Exceptions at 42-43.)

As the Commission is aware, Nicor is currently challenging several provisions of the IPA-approved final draft sourcing agreement in Circuit Court, pursuant to the Illinois Administrative Review Law. At the time PA 97-0630 passed the General Assembly on November 29, 2011, Nicor had already filed its Administrative Complaint in Circuit Court; the General Assembly could have - but chose not to - add non-severability to the enumerated reasons for early termination. (*See* Bill Status for HB 691, http://ilga.gov/legislation/billstatus.asp?DocNum=691&GAID=11&GA=97&DocTypeID=HB&LegID=56476&SessionID=84 (accessed January 28, 2012).)

CCE respectfully submits that keeping either Section 1.2(h) or Section 14.20 in the Sourcing Agreement would be plainly contrary to the Act and unreasonable. Retaining either provision would allow for an avenue to terminate the contract that is not contemplated by the Act -- in other words, those Sections must be removed under the clear terms of the Act.

D. The Commission Should Grant Rehearing Regarding Correction Of Typographical And Scrivener's Errors

The January 10 Order failed to correct numerous typographical and scrivener's errors that CCE identified, and that Staff agreed should be corrected. Section 9-220(h-4) of the Act mandates that the Commission is to correct typographical and scrivener's errors. (*See* 220 ILCS 5/9-220(h-4); CCE Brief on Exceptions at 24-25.) Scrivener's errors are instances where the parties had a meeting of the minds but the mutual understanding was defeated by the actual contract language. (*See id.* at 25, 49-50.) Scrivener's errors do not require after-the-fact agreement. (*See id.*)

The typographical and scrivener's errors in the final draft sourcing agreement that should have been corrected by the January 10 Order include, but are not limited to, the following:

- There is a distinction between the Title Transfer Point and the Receiving Pipeline, and Sections 4.2 and 4.8 should be amended to correct the implication that the two are synonymous, which contravenes the intent of the parties to create separate definitions to address separate scenarios. (*See* CCE Brief on Exceptions at 53-55.) In addition, the mutually agreed-upon definition in Section 4.8 should be referred to every time the final draft sourcing agreement references the term Title Transfer Point.

- The final draft sourcing agreement incorrectly states that, contrary to the intent of the parties and the other provisions of the final draft sourcing agreement, which require acceptance of Conforming SNG delivered to the Title Transfer Point, that there would be grounds for rejecting Conforming SNG provided at the Title Transfer Point. (*See id.* at 55-57.)

- The calculation for escalation of O&M costs was intended to be pegged to the value of 2011 dollars, but the final draft sourcing agreement used 2010 dollars, which would lead to potential over-recovery of O&M funds. (*See id.* at 57-58.)\

- No party disputes that CCE should pass through the actual cost of fuel; however, CCE noted (and Nicor Gas and the IPA agreed) that there were remaining errors in the final draft sourcing agreement that were preventing exact recovery of those costs. (*See id.* at 58-60; CCE Reply Brief on Exceptions at 7-8; *see also* Nicor Gas Brief on Exceptions at 8-9; IPA Memorandum dated October 11, 2011 at 14.)

- The final draft sourcing agreement defines the term Notice to Proceed, but does not use the actual term, instead using "notice to proceed with construction" (uncapitalized), which appears to have been given substantially the same meaning but causes confusion because Notice to Proceed - the defined term - is not used. (*See* CCE Brief on Exceptions at 60-61.)

- There is an Annex A to the final draft sourcing agreement that is not actually referenced in the body of the final draft sourcing agreement, and which in turn should be deleted. (*See* CCE Brief on Exceptions at 64.)

- "Annualized Daily Average" is integrated into the final draft sourcing agreement as a capitalized term, but not defined; the correction to use "Maximum DCQ" instead solves the ambiguity. (*See* IPA December 16, 2011 Response to CCE's Corrected Version of Form SNG Agreement at Ex. 2 at 3.)

- Uses of the term "Transportation and Marketing Component" should refer back to Section 5.2, where the term is defined. (*See* CCE Brief on Exceptions at 64.)

For the Commission's convenience, CCE is attaching hereto as Attachment F a chart that identifies each of the typographical and scrivener's errors that should be reconsidered and corrected upon rehearing. Accordingly, rehearing should be granted for the purpose of addressing necessary changes to typographical and scrivener's errors in the IPA's final draft sourcing agreement.

V.

CONCLUSION

CCE appreciates that this is a unique proceeding before the Commission, involving unusual issues and a compressed case schedule. However, the Commission's January 10 Order improperly undercuts the financeability of the clean coal SNG brownfield facility. That result is directly contrary to repeated legislative and executive actions to foster the development of that facility. Because of this, and because, respectfully, the January 10 Order reached incorrect

results on several critical questions, CCE urges the Commission to grant rehearing as requested herein.

WHEREFORE, CCE respectfully requests that the Commission:

1. Grant this Application for Rehearing on the issues outlined above;

2. Enter an Order on Rehearing consistent with the terms of the Draft Order on Rehearing attached hereto as Attachment B;

3. Approve a Sourcing Agreement consistent with the Draft Sourcing Agreement attached hereto as Attachment C; and

4. Grant such additional or different relief as required by the interests of justice.

Respectfully submitted,

CHICAGO CLEAN ENERGY, LLC

By: */s/ Christopher J. Townsend*
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DATED: February 9, 2012

VERIFICATION

State of Illinois)
)
County of Cook)

Christopher J. Townsend, being first duly sworn, on oath deposes and says that he is one of the attorneys for Chicago Clean Energy, LLC, that he has read the foregoing document, knows the contents thereof, and that the same is true to the best of his knowledge, information, and belief.

_____
Christopher J. Townsend

Subscribed and sworn to before me
this _____ day of February 2012.

_____
Notary Public